SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 2 1971
E. ROBERT SEAVER, CLERK

No. 71-5

In The Supreme Court of The United States

OCTOBER TERM, 1971.

RAYMOND C. AINSWORTH, *Chairman*,
EDITH Y. SNOW, *Secretary*,
and GERALD F. MCCARTHY, *Member*,
as they comprise the School Committee
of the Town of Leyden,
Petitioners

v.

NEIL V. SULLIVAN, as He is *Commissioner of Education*
of the Commonwealth of Massachusetts,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

The petition for a writ of certiorari, which was filed with this Court on July 1, 1971, seeks review of a "final decree after rescript" entered in the Superior Court of Massachusetts (Pet. 31). The decree followed a decision of the Supreme Judicial Court of Massachusetts which determined that an authorization of the respondents permitting bible reading and prayer in the public schools of the Town of Leyden, Massachusetts was constitutionally prohibited (Pet. 37-41).

The decision of the Supreme Judicial Court was filed on March 2, 1971, and, on that same day, the Court entered a rescript which contained its order in the case (Pet. 29). Under Massachusetts local practice, the rescript is also filed with the Superior Court, and there remains only the ministerial act of entering a "Final Decree After Rescript" to terminate the litigation. The petition ostensibly seeks review of that latter decree which was entered on April 5, 1971.

In our view, the petition is clearly out of time, and the Court is not required to consider the petition on its merits.[1] A petition for a writ of certiorari must be filed within ninety days of the "judgment or decree" sought to be reviewed. 28 U.S.C. § 2101. Although petitioners will doubtless argue that the ninety days runs from the entry of the final decree after rescript, this Court has held otherwise. In *Cole* v. *Violette*, 319 U.S. 581, at 582, the Court stated:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See *Boston* v. *Santosuosso*, 308 Mass. 189, 194, 31 N.E.2d 564; *Carilli* v. *Hersey*, 303 Mass. 82, 84, 20 N.E.2d 492. But in determining what is a final judgment or decree within the meaning of Section 237 of the Judicial Code, 28 U.S.C. § 344, 28 U.S.C.A. § 344, we are not controlled by the designation applied to it in state practice. *Dept.*

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[1] In any event, the decision of the Supreme Judicial Court was clearly correct given the governing principles and cases cited by the Court. See Pet. 39-40. There is thus no substantial reason for granting the writ.

of Banking v. *Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 235, 87 L. Ed. —; *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S.Ct. 962, 86 L.Ed. 1300. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript, was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was not applied for within the time provided by law. *Dept. of Banking* v. *Pink, supra,* and *Matton Steamboat Co.* v. *Murphy, supra.*"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1971